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No. 303.

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1929.

THE ATCHISON, TOPEKA AND SANTA FE RAILWAY COMPANY, PETITIONER,

VS.

MABEL G. TOOPS, ADMINISTRATRIX OF THE ESTATE OF M. G. TOOPS, DECEASED.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI.

CARR W. TAYLOR,
JAMES N. FARLEY,
of Hutchinson, Kansas,
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(34,434)

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STATEMENT OF CASE.

To the Honorable the Chief Justice and Associate Justices of the Supreme Court of the United States:

The respondent, Mabel G. Toops, administratrix of the estate of M. G. Toops, deceased, respectfully show to this Honorable Court that the petition of the petitioner for a writ of certiorari should be denied, and in support thereof desires to show to this court that the statement

of facts set forth by the petitioner on page 3 of its petition is incomplete in many important details; and further shows to the court that the following is a true and correct statement of this case. For convenience we have classified and enumerated the uncontradicted and admitted facts by paragraphs as follows:

(a) Conductor Toops was killed on August 13, 1926, at Rolla, Kansas, a station on the Dodge City-Elkhart branch of the petitioner's lines, about 12:30 to 12:45 o'clock in the morning. The night was very dark.

(b) At the time of his death Conductor Toops had been in the service of the Santa Fe Railroad Company for a period of 13 years, or more, and during the 4 or 5 years immediately preceding his death he had been engaged in the passenger train service out of Kansas City, Missouri, and on a different division of the Santa Fe from where the accident took place.

(c) The trip from Dodge City to Elkhart on August 12, was his first trip over that line for a period of approximately thirteen years.

(d) The freight train on the way down from Dodge City to Elkhart did not stop at Rolla, and Conductor Toops therefore had no opportunity to inspect the elevator track at that station.

(e) Rolla, Kansas, is a station on the Elkhart-Dodge City branch, with a population of less than 200, and contains in addition to the main line track, a passing track, a house track and an elevator track running in a general east and west direction through a pronounced cut which, on the south side, resulted in a bank some 8

or 10 feet high close to the main line track on the south side and extending along the elevator track to the south from the main line track so that a person on the elevator track at the derail switch or immediately west thereof or immediately east thereof, is invisible to a train crew operating on the main line east of the elevator switch. This cut is shown by the photographs contained in the record on pages 85 and 86.

(f) Conductor Toops was slightly acquainted with Mr. Hall, the engineer, and with Mr. Phillips, his fireman, but had never before seen either one of the brakemen on his freight train.

(g) When they arrived at Rolla on their way back to Dodge City the engine stopped near the depot. Mr. Nolan was the head brakeman and was on the engine. Conductor Toops and Hemphill, the rear brakeman, were in the caboose and they got off of the train, one going on one side and one on the other until they came to the depot. Four empty cars which had been picked up at Wilburton, a station between Elkhart and Rolla, were sent with the engine eastward and were backed in on the elevator track and attached to 5 cars loaded with grain standing on the elevator track. Nolan, the head brakeman, went with the engine and empty cars, and Hemphill went across to the elevator track and assisted in the coupling up of those cars for their movement out on to the main line track. Those cars were brought back and Conductor Toops coupled them to the train standing on the main line track. The engine went forward with Mr. Nolan, the head brakeman, and was switched on to the passing track from the main line, came back

and pushed the cars together that were fouling the cross-over switch east of the depot. Hemphill left Toops near the depot platform and went over and coupled up the stock cars. 5 of the 15 grain cars on said passing track west of the stock cars, were west of a highway crossing which was kept open. The grain cars east of the crossing were pushed back and were coupled with those 5 cars west of the road crossing, and the whole train was pulled out over the cross-over track on to the main line.

(h) When this train of 27 cars was pulled on to the main line and the cross-over switch closed, brakeman Nolan was still on the front end of those cars. Hemphill was somewhere near the rear end thereof. The elevator track left the main line and ran on a curve in a southwesterly direction along the high bank, 8 to 10 feet high, which extended eastward along the line of the 27 box cars attached to the engine on the main line track. Neither the enginemen nor the brakemen from their positions could see around the curve on account of the high bank.

(i) Nolan, the head brakeman, testified (R. 23 and 24), and his testimony is substantiated by all the other members of the train crew, as follows:

> "There was nobody on the fifteen moving grain cars when they were cut loose from the stock cars and speeded back on this elevator track. Nobody in control of them. They were not lighted in any way. There was no light on the west end of those fifteen grain cars that were moving west. There were no other lanterns visible to me as we kicked those cars except Mr. Hemphill's lantern, and it was purely by his lamp signals that I was working by, and I was unable to see Mr. Toops on account of the curve there and the cars pointing

on this elevator track, wouldn't make it possible for me to see him if he was around the curve. It would make it impossible for me to see further than just the main track switch on account of that 'L' and the curve that is there. If he had been beyond that I couldn't have seen him from where I was working. Mr. Hemphill's kick-in signal could not have been seen from the derail where Mr. Hemphill was standing. *The signal couldn't have been seen from the derail where Mr. Toops' body was found. It couldn't have been seen from there to the cross-over switch where Mr. Hemphill was passing the signal from.* There was no whistle signal given, and I don't believe the bell was rung. I wouldn't want to say for sure because the bell is something you can't very well hear if the cars are moving at the distance I was from the engine. It may have been ringing, but I don't remember if it was. The engine whistle wasn't blown at any time after we started switching in the yard until it was blown to call the agent after we found Mr. Toops' body."

(j) Hemphill, the rear brakeman, gave a kick-in signal to Nolan and the enginemen, but the first attempt to kick-in was not successful because Nolan was too slow in getting on the cars and cutting the 15 grain cars off from the 12 stock cars, and a second signal was given. The cut was successfully made at the second signal and both brakemen remained with the 12 stock cars and the engine and sent the 15 grain cars down the main line track and onto the elevator track with no one on them or in control of them.

(k) The acts of negligence committed by the petitioner as shown by the evidence, may be briefly stated as follows:

First, the kick-in of 15 grain cars.

Second, with no one on them to control them or stop them in case of danger.

Third, no light was on the front end of the moving cars.

Fourth, no kick-in or push signal was given by the engineer by blowing the whistle.

Fifth, the bell was not rung as a warning to any person who might be upon the elevator track.

Sixth, the track was defective at the derail where Conductor Toops was killed, in this, that the ties were practically without ballast or dirt filling between them, and weeds and thistles had grown up between the ties and about the track. It was a skeletonized track and so dangerous as to require extraordinary care for any trainman or other person to cross it without accident on a dark night.

Seventh, Conductor Toops, as we have seen, saw this track by the aid of the light from his lantern for the first time in thirteen years.

Admitted Facts Showing How Conductor Toops Met His Death.

(1) Toops' body was found between the rails of the elevator tracks at the derail with his shoulders jammed against the derail, his body lying diagonally across the track between the rails, with his feet to the east and north, his head and right arm, mashed off by the wheels of the cars, and his hat, were lying south of the south rail of the elevator track near the derail.

Rule 471 (R. 84) reads as follows:

"They (the conductors) must know (so far as possible) that switches are right before attempting to pass or use them, and particularly acquaint themselves with location of *derailing switches* and know they are right before attempting to pass them."

Conductor Toops' lantern and lead pencil were lying together south of the elevator track about 2 or 3 feet away from the south rail of the track, his lead pencil lying between his lantern and the south rail. His train book, a large fold, containing 34 or 35 way bills, was found lying in the center of the track between the rails. The surface of the track between the rails showed clearly that the body of Conductor Toops was dragged westward 2 or 3 feet until his shoulders were jammed against the derail. 4 or 5 cars passed over his body and were standing west of the derail where they stopped for lack of momentum.

(m) Nolan and Hemphill after kicking in the 15 grain cars on the elevator track, then kicked in the 12 stock cars on the passing track with the stock cars. Nolan remained with the engine and closed the cross-over switch at the main line, and coupled the engine when it ran back to the east end of the 15 grain cars standing one or two car lengths west of the cross-over switch on the main line, and then got up on the train. While he was doing this Hemphill set the brakes on the stock cars when they were clear of the cross-over switch connecting with the passing track; then got off of the cars and went south and got on the string of 15 grain cars standing on the elevator track. He gave

a go-ahead signal but the enginemen did not see it. The engine was not then coupled on to the cars. Nolan, after coupling the engine to the cars, climbed on the front end of the standing cars and Hemphill repeated the signal, Nolan relayed it to the engineer, and the train started westward pushed by the engine.

Nolan walked to the second car west from the engine and on to the south side of the roof thereof in order to better signal to the engineer. They ran a few car lengths when Nolan saw Conductor Toops' lantern lying south of the track, and gave the washout or emergency signal apprehending that something was wrong. The train stopped within a car length. Nolan got off and discovered Toops' arm, head and hat, also his lantern and lead pencil, lying between it and the track, south of the track. Nolan's lantern had gone out in his rapid descent off of the car and he made a mark with his heel by the side of Toops' lantern and picked it up and looked for his body and found it lying under the engine in the position hereinbefore described. Blood was found on all of the cars except the first car on the west end of said string of 15 cars.

(n) There was a highway crossing which ran approximately north and south over all of the tracks at Rolla station, about 4 or 5 car lengths west of the depot, as shown by the evidence of Hemphill and Nolan. Hemphill, while speaking of coupling up the stock cars and grain cars which were standing on the passing track north of the depot, said (R. 30): "There was one road crossing cut in the grain cars; otherwise they were coupled together." Nolan testified (R. 23): "There

was a road crossing back there that was cut. There was another coupling back between the engine and the road crossing. The road crossing was west of the depot about 4 or 5 car lengths."

(o) There were no switch lights at Rolla station nor any yard limit signs (R. 37).

(p) There was no lighted lantern on top of those 15 grain cars. Hemphill testified (R. 38): "When I got up on top of those 15 grain cars there was nobody else on top so far as I saw. There wasn't any lantern there. If there had been a lantern up there I would have seen it unless the person had it behind him or hid in some way. You could see anyone with a lighted lantern on top of any of those 15 cars."

Company Rules for Switching Cars at Stations.

(q) A book of rules prepared by appellant and issued to trainmen for their government in the handling of trains, was introduced in evidence. The definition of "station" and "yard" were especially referred to in the evidence by petitioner, and read as follows (R. 28):

> "Station—A place designated on the time-table by name, at which a train may stop for traffic; or to enter or leave the main track; or from which fixed signals are operated.
>
> "Yard—A system of tracks within defined limits provided for the making up of trains, storing of cars and other purposes, over which movements not authorized by time-table, or by train order, may be made, subject to prescribed signals and regulations."

The undisputed evidence showed that Rolla is a station and comes under the first definition given above.

Conductor's Duty at Stations.

(r) The following rules defining the duties of conductors at stations and especially referred to at this trial, read as follows (R. 84-85):

"Rule 381. Conductors of freight trains are required to do their work thoroughly at stations, bearing in mind that trains are run to do the business of the road and not merely to make time over it. Trains, however, are expected to run with regularity and as nearly on time as the prompt performance of work and rules will permit.

"Rule 396. They must do such switching as shall be necessary in taking cars for their own trains or in leaving cars from the same. Local freight trains are generally to do necessary switching at stations, but any freight train may, in case of necessity, be called upon by Station Agents to do such work, and the same will be performed. Conductors when at stations doing work will attend personally to the switching unless engaged in checking the unloading way-freight as provided in Rule 389, when they may allow Brakeman, if competent, to do the switching.

"Rule 398. When cars are taken on at intermediate stations, they must be carefully examined. They must see that cars already on sidings, as well as those set out by them, are safely and properly left. Cars or engines must always clear the main or other adjoining tracks a safe distance.

"Rule 471. They must know (so far as possible) that switches are right before attempting to pass or use them, and particularly acquaint themselves with location of derailing switches and know they are right before attempting to pass them.

"Rule 483. They will take into consideration that the lives of passengers and trainmen, as well as the property of the company, are entrusted to their care, and it is fully expected and required

that they will not only attend to all signals and instructions, but also that they will, on all occasions, be vigilant and cautious themselves, not trusting alone to signals or rules for safety. Whenever it becomes necessary to protect rear of train engineman will promptly signal flagman as per Rule 14 c)."

(s) The following are the company's rules to be observed by trainmen in stations while switching and moving cars in such stations, to-wit (R. 51):

"Sec. 102. When cars are pushed by an engine (except when shifting in making up trains in yards) a flagman must take a conspicuous position on the front of the leading car and signal the engineman in case of need.

"Sec. 320. Trainmen and yardmen, before switching or moving cars at stations, must ascertain that there are no persons or property on or about the same that might be injured or damaged by so doing.

"Sec. 473. They will, in rounding all curves where the view is obscured, sound the whistle, using the signal prescribed in Rule 14 (Rule 14 provides for two distinct whistles).

"Sec. 478. They will use great care in backing up to take a train, or backing into a siding to take or leave cars, and will approach so slowly that couplings can be made without injury to persons or property.

"Sec. 24. When cars are pushed by an engine (except when shifting or making up trains in yards) a white light must be displayed on the front of the leading car by night."

Conductor Toops' Movements After He Had Coupled Up the Five Grain Cars to His Train On the Main Line.

The evidence is undisputed that Conductor Toops remained on the station platform going through his

switch list after he had coupled up the 5 grain cars above mentioned. Mr. Nolan, the head brakeman, saw Toops on the platform at the time the 27 stock cars and grain cars were pulled out on the main line over the cross-over switch (R. 24). Hemphill, the rear brakeman, saw Toops on the east end of the platform with his lantern on a truck and his train book in his hand, looking through his switch list (R. 35).

As we have seen from the rules governing the conduct of conductors, hereinbefore quoted, it was Conductor Toops' duty to assist in the switching operations; it was his duty to personally see that the cars were spotted at the respective elevators as called for by the switch list which he was examining when last seen by Nolan and Hemphill, to see that there were no obstructions on the track, that the road crossing west of the depot was left open, that the brakes were properly set to hold the cars at each one of the elevators; and the performance of these duties called him to be on the south side of the elevator track on the engineer's side of the train where switching operations are carried on by the brakemen. The derail on the elevtor track where Toops' body was afterwards found, is about 300 feet east of the depot. There is a path on the south side of the main line eastward from the depot. Conductor Toops followed that path to a point north of the derail and then started south to cross over the elevator track. This is clearly shown by the circumstances surrounding the death of Conductor Toops. The evidence showed conclusively that the elevator track at the derail is skeletonized. Mr. Bryan, witness for the respondent,

testified (R. 81) that there was possibly a gallon of dirt between the ties. Thistles and weeds had grown up between the ties at that place and obscured the real condition of the track. The route which we have just described, which we contend Mr. Toops traveled to the point where he was killed, is the nearest and most practical route from the west end of the depot platform where he was last seen, and it is not unreasonable to conclude that that was the route he took. No eye witness saw Conductor Toops meet his death. The inevitable conclusion must be reached from the physical facts in evidence is that Conductor Toops, when he arrived at the elevator track did not know that the train crew had kicked the 15 grain cars on to the elevator track, for the reason, as shown by the undisputed evidence, that no warning, kick-in, or push signal was given by the engine crew; and that the engine bell was not rung. The track being curved and the rear end of the 15 grain cars not being visible to the engineer or either one of the brakemen because of the high bank that obstructed the view, made it impossible for any lantern signal to be given by the brakeman to Conductor Toops. No brakeman was on the west end of the said grain cars nor was there a white light on the end thereof. So no warning of any kind was given to him of the approach of the 15 grain cars that had been kicked in on the elevator track, notwithstanding the fact that the rules required such warning signals to be given. Conductor Toops had a right to rely upon the performance of the rules in such cases, by the enginemen and the brakemen. Conductor Toops had a right to rely upon the provisions of Rule

473 (R. 51) which provided that in rounding all curves where the view is obscured, a whistle shall be sounded twice, notifying him that the cars are being kicked in on the elevator track. Engineer Hall testified (R. 42): "It is usual for the engineer to give a signal when he is starting up a train on a kick signal." He had a right under the rules to believe and rely upon the fact that one of his brakemen would ride the kicked-in grain cars as they moved on to the elevator switch, and that the brakeman would take a position on the west end of the first car where he light could be distinctly seen as the cars moved westward on the elevator track as provided by Rule 102 which reads as follows (R. 51):

> "Sec. 102. When cars are pushed by an engine (except when shifting in making up trains in yards) a flagman must take a conspicuous position on the front of the leading car and signal the engineman in case of need."

The night was very dark. As we have seen, Conductor Toops was not familiar with the elevator track. He approached it from the north for the first time in 13 years and when he arrived at the track and attempted to cross the same, the law presumes that he was in the exercise of due care; and due care means that he listened for signals and heard none, that he looked for approaching cars and saw none, and that he stepped upon the defective track for the purpose of crossing over same, he instantly became aware that the kicked-in cars were upon him, but on account of the defective condition of the track it was impossible for him to escape; that he then made an effort to stop the train by throwing his lantern to the south side of the

track, his lead pencil going with it, but on account of the curve in the track this signal was not seen and he was knocked down by the west end of the moving grain cars, his train book containing 34 or 35 bills dropped into the center of the track between the rails and was lying 2 or 3 feet east of his body.

ARGUMENT.

The following physical facts show how Toops met his death:

(1) He threw his lantern to the south side of the track as an emergency stop signal, but on account of the curve in the track and the high bank on the south side of the track, there was no one to observe it; and there was no one on the drifting cars to see the lantern and stop the train.

(2) His lantern was found 3 or 4 feet south of the south rail on the elevator track, with his lead pencil lying between it and the track, a second physical fact showing that he carried his pencil and lantern in the same hand.

(3) Hemphill testified (R. 40) that he believed Toops was right handed. That was his recollection. Inasmuch as he was going southward in his attempt to cross the track, it was but natural for him to throw his lantern with his right hand, and at the same time his lead pencil went with it.

(4) A fourth physical fact showing that he was struck by the west end of the 15 grain cars is the testimony of Mr. Hemphill (R. 38) that his train book with 34 or 35 bills in it was found in the center of the track between the rails east of his body. Evidently he was carrying his train book in his left hand at the time he was struck by the train, and dropped it in the center of the track when he was struck by the moving car.

(5) A fifth physical fact is that his body was dragged between the rails after he was knocked down, for a distance of 2 or 3 feet (R. 38). Hemphill testified: "The gravel was a little scuffed and looked like it (the body) might have been turned over and dragged possibly 2 or 3 feet."

(6) The sixth physical fact is shown by the body lying on its back between the rails, with the shoulders jammed against the derail and the feet east and north of the shoulders near the north rail.

The undisputed physical facts show conclusively that Conductor Toops could not have fallen off of the top of the train on to the track. It is certain that if he had climbed up on top of any one of the cars his lead pencil would not have been in his hand but he would have put it in his pocket; also his train book with the bills in it, would have been in his coat pocket. If he had fallen off of the car, both the lead pencil and the train book would have been found in his pockets as he lay with his shoulders jammed against the derail and his feet near the north rail of the elevator track. The position of the lantern shows that it was thrown to the south of the track, and that it did not fall with Conductor Toops from the top of the train as suggested by counsel for the appellant. We contend that no other reasonable hypothesis than that which we have given above can be drawn from the physical facts in this case.

The petitioner has made continuous reference to the fact that Toops knew that these cars were to come back on the elevator track. The testimony regarding that statement is Hemphill's (R. 39), in which he says that

Toops asked him if these 15 cars were all in one cut, and Hemphill told him they were and said that he would take them all in to the elevator track. Toops said: "All right, I will look out for them." Hemphill was the rear brakeman and under the rules it was his duty to take these cars back on to the elevator track. Rule 102 (R. 51) says that a brakeman must take a conspicuous position on the front of the leading car and signal the engine in case of need; and Rule 24 (R. 51) says that a white light must be displayed on the front of the leading car by night. So when Hemphill told Conductor Toops that he would take the 15 grain cars in to the elevator track, Toops expected him to do just that—to take them in, and to ride the front end of them and display a light. Hemphill did not say anything about kicking the cars in; Toops didn't know anything about any custom of kicking cars in, and he had every reason to believe that Hemphill would do just what he said he would do—take the cars in—and Toops was looking out for them. But by Hemphill's own testimony, he did not take the cars in. His testimony is abstracted as follows (R. 36):

> "I do not know that there was anybody on those 15 grain cars when they were separated from the stock cars. There was no light on the cars. There was no light on the west end of the west car."

And on page 38 of the record he testified as follows:

> "When I gave the signal for the kick-in and it was made, there was no signal that I know of given by the engine nor the bell, that I heard."

So we are of the opinion that our case is made stronger by reason of Hemphill's statement to Toops

that he would take the cars in on the elevator track; and then his own testimony and the testimony of other witnesses is to the effect that he did not take them in. It would have been a very simple matter for Hemphill to have made his word good to Toops and have ridden the kick-in cars on to the elevator track to warn Toops or anyone else on the track of their approach. When the engine had the 27 cars out on the main line, they were necessarily all of them east of the cross-over switch, and Hemphill was standing at the cross-over switch so when he gave the kick signal the entire train was east of him. When, in response to his kick signal, they backed the cars up and the west end of the car passed Hemphill, all he would have had to do to have made his word good to Toops and taken the cars in on to the elevator track, would have been for him to swing on to the first car with his lantern. But he did not do that—he just stood there and let the entire 15 cars run past him without anyone on them and without warning to Toops. Then he threw the cross-over switch and rode the stock cars in on to the passing track and stopped them. He knew Toops would not be on the passing track; he knew Toops' duty called him to cross the elevator track; and he had told Toops that he would take the cars in. Under the rules and under his statement to Toops, it was his duty to ride these kicked-in cars on to the elevator track. Mr. Justice Burch in his dissenting opinion attacks the reasoning of the respondent and says in effect that to have observed the rules would have resulted in an absurdity. However, that is not true, as the court will readily see.

It certainly would not be an absurdity for Hemphill to have followed the rules and his promise to Toops that he would take the cars in, and to have gotten on to the front end of the grain cars which were kicked in to the elevator track instead of just standing idly by and letting them all roll past him. He could have ridden these cars in, protected Toops, and then walked back to the cross-over switch and ridden the stock cars in. It would not have taken him over two or three minutes to have done so and thus avoided this terrible accident.

It is no excuse that Toops knew of the coming of the grain cars, as found by the jury. He did not know that they would be kicked in without a signal from the engineer in accordance with the rule; he did not know that they would come silently down upon him without a white light on the end thereof; he did not know that they would come down upon him without a brakeman in charge of and in control thereof and in a conspicuous position on the end of the car where he could see any person upon the track and protect them from the danger. Toops was familiar with all of the rules and had a right to believe that his brakemen and enginemen were familiar with the rules; he had a right to believe that the rules would be observed by each one of his trainmen; it was but natural for him to make the attempt to cross over the track because of the fact that no warning of any kind had been given that the cars were approaching.

The rules of the company hereinbefore quoted and which we have referred to, apply particularly to the duties of trainmen at stations, and those rules applied

with peculiar force to the conduct of the train at Rolla. The definition of "station" will be found on page 28 of the record, and the definition of a "yard" in the same book of rules will be found on page 28 of the record. The trouble with the defense in this action has been that it assumed in the trial of this case that Rolla was a yard and not a station, and attempted to apply yard rules to what happened at a station, instead of applying the rules with reference to a station. We emphasize this for the reason that the distinction is clear and controlling in analyzing the facts in this case. Fireman Phillips' testimony (R. 46) to the fact that it is not the habit to whistle while switching in the yards, does not apply to the tracks at Rolla for the reason that the yard rules do not apply and the rules we have quoted in this brief shows that the yards are excepted, especially in rules 102 and 24 (R. 51). L. A. Arthur testified (R. 55) that a station is where you receive and discharge passengers; that a yard is a place where you switch or make up trains; and that a yard is defined by yard limit signs; and said, "I do not know of any yard limits at this station, and I haven't been out there for some time." Nolan testified (R. 28) that there were no yard limit marks at Rolla station. Arthur's testimony that a station is where you receive and discharge passengers, was not sustained by any rule referred to in the book of rules supplied by the company—it was merely his statement. His further statement that a yard is any place where you switch or make up trains was also in conflict with the definition given in the rule book hereinbefore quoted.

From the foregoing it must inevitably follow that the trainmen were bound by all of the rules in the operation of switching at Rolla, Kansas, and having violated every one of the rules which we have referred to, the company was guilty of negligence. If the court concurs with us in this and also concurs with us as to the manner in which Toops came to his death—that he was struck by the west end of the west car, knocked down and killed—and the physical facts and circumstances are sufficient to warrant that conclusion, then the judgment of the lower court must be sustained.

Under the facts in this case the question of negligence was properly submitted to the jury and has been squarely decided in the case of *Willever* v. *Delaware, L. & W. R. R. Co.,* 89 N. J. L. 697, 99 Atl. 321 (1916) rev'g 87 N. J. L. 348, 94 Atl. 595 (1915) (19 N. C. C. A. 483 n.). That case is very similar to the one before the court now, syllabus 1 reading as follows:

> "Where as a part of its operating system, a common carrier by railroad in interstate commerce has provided and notified its employees of, a rule that in the 'movement of trains' when 'cars are pushed by an engine' a man shall take a 'conspicuous position on the front end of the leading car to signal the engineman in case of need,' and an employee so notified of the rule, who, in the performance of his duties, has, in reliance upon the rule, placed himself 200 feet in front of a long train of empty freight cars not being 'drilled,' and standing on a track not used for 'drilling' purposes, without engine or crew, is run down because a train crew attached an engine to the far end of the train, and without warning pushed it over him without a man being placed on the front end of the leading car in accordance with the

rule, the question of the negligence of the train crew, the common carrier's employees, was properly left to the jury, citing *D'Agostino* v. *Pennsylvania R. R. Co.*, 72 N. J. Law, 358, 60 Atl. 1113, and *Germanus* v. *Lehigh Valley R. R. Co.*, 74 N. J. Law, 662, 67 Atl. 79."

The rules as to the conduct of a train crew in switching trains in yards, in the Willever case, are similar to the rules set forth in this case.

Quoting from the opinion in the Willever case, *supra*:

"The Rule No. 102 quoted above was contained in a book of rules under the subheading 'Movement of Trains.' Some witnesses testified that this book of rules was for the operating of trains out on the main line only and was not intended to apply to yard work. The evidence also showed that the book of rules was given to employees whose duties were exclusively within the yards as well as to employees who worked or ran trains on the main lines. Willever was furnished by the company with a copy of this book of rules. There was nothing in the book of rules to indicate that Rule No. 102 had no application to 'movement of trains' within yard limits, nor was there any evidence that Willever had ever been told that it did not so apply within those limits. The language of the rule itself is, 'When cars are pushed by an engine,' and the subdivision under which it occurs is headed, 'Movement of Trains.' * * * Turning now to the second point relied upon by the supreme court, it is said that Willever having received instruction and knowledge, as a section foreman for five years, that he must look out for his own safety, the defendant company, under the doctrine of assumption of risk, as applied in the case of *Precodnick* v. *Lehigh Valley Railroad Co.*, *supra*, was, as to him, under no duty to give warn-

> ing. We do not think the negligence of defendant's employees in failing to comply with the rule established for Willever's safety was one of the dangers he undertook to look out for, and therefore one of the risks he assumed. Obviously Willever's undertaking to look out for his own safety is, to a certain extent, a relative assumption, and therefore prescribed by the limit of dangers incident to his employment under the system established for the operation of the business. This is necessarily so."

The rule book furnished the Santa Fe employees contains Rule 102 in the identical words as Rule 102 in the Willever case with the exception of the addition of the words in parenthesis "except when shifting or making up trains *in yards.*" We believe that the addition of those words in parenthesis emphasizes and brings more forceably to the attention of trainmen and crew that when switching or making up trains in yards, the crew with which they are operating will not look out for them, that they must look out for themselves in the shifting or kicking in of cars without warning signal; but that when they are on the road and at stations or when shifting cars on tracks which are not in the yards, then they must give warning, and that negligence to do so by a member of the crew is not such a risk as is assumed by the other members.

Rolla, Kansas, is not a yard. The crew was not making up a train. They were in road work and Rule 102 was in full force and effect.

In the case of *Chesapeake & O. R. Co.* v. *Proffitt*, 241 U. S. 462, 134 C. C. A. 37, 218 Fed. 23, the court had before it a case very similar to the one here.

Proffitt, a brakeman, was injured when a collision took place caused by the yard crew who negligently and with undue violence (as the jury doubtlessly found) drove a cut of 29 cars into the standing cars upon which the plaintiff was working. There was some conflicting testimony as to whether or not any signal had been given and as to whether or not anyone was on the cars kicked in against the cars upon which Proffitt was working. In the opinion, page 465, the court said in affirming the judgment of the circuit court of appeals:

> "Whether it was usual, in conducting such switching operations, to have a man at the forward end of the moving cut of cars, was in dispute. Plaintiff testified that 'it is the custom to have a man on the front end of a cut of cars that is being switched into other cars, who looks out for that and runs and stops the engine just before they get there, in making the coupling.' Two of the defendant's witnesses contradicted this; one in terms denying the custom of giving a warning as stated by the plaintiff; the other declaring that 'all the warning he knew of being given, or the practice, was for the men in and about the train to take care of themselves and see for his own danger when he attempts to do any work, and the witness knew of no signals given.' While another and experienced witness, called by the defendant, being asked if it was customary when running in a cut of cars to have a man on the front end with a light, replied: 'Well, on the yard in switching cars they come right down to the book rule. It says where cars are being shoved a man must be placed on the head car.' Whether there was a man at the forward end of the cut of cars that produced the collision in question was in controversy. As to plaintiff's opportunity to gain knowledge of the alleged custom, it did not distinctly appear that he had previously worked on

a manifest train. He testified that he had been employed as a brakeman something more than five years, part of the time as an extra man and part of the time as a regular man; that he was an extra man when hurt; had been a regular brakeman until about three weeks before the accident, when he was 'pulled off the local freight.'

"Plaintiff recovered a verdict for substantial damages, and the judgment was affirmed by the circuit court of appeals (132 C. C. A. 37, 218 Fed. 23)."

In this case the petitioner has virtually admitted and does admit that the rules provided by the company were violated by the switch crew; that there was no man on the rear of the switched cars; that there was no light on the rear of the switched cars; and they admit that no warning, either by whistle or bell, was given by the train crew of the kicking in of the cars, and that the track was defective at the place of the accident.

Their whole petition is based upon the hypothesis that, granting all those acts of negligence, still there is no evidence that the death of Toops was caused by such acts of negligence. In other words, that they were not the proximate cause. It is our contention that whether or not they were the proximate cause of Toops' death were questions for the jury, quite properly submitted to the jury and having been so found by the jury, are conclusive. *Donegan* v. *Baltimore, etc., R. Co.,* (N. Y. 1908) 165 F. 869, 91 C. C. A. 555; *Erie R. Co.* v. *Schleenbaker,* 257 F. 667, 40 Sup. Ct. 13, 250 U. S. 666, 63 L. Ed. 1197; *Southern Pac. Co.* v. *Thomas,* 188 Pac. 268, 41 Sup. Ct. 447, 255 U. S. 576, 65 L. Ed. 793; *Davis* v. *Wolfe,* 44 Sup. Ct. 64, 263 U. S. 239, 241 S. W.

915, 294 Mo. 170; *Hughes* v. *Delaware, D. & W. R. R. Co.*, 233 Fed. 118.

This last cited case, *Hughes* v. *Delaware, D. & W. R. R. Co.*, 233 Fed. 118, is similar to this case in many of its facts. It will be sufficient to quote a small part of it beginning on page 120:

> "It was claimed on the trial, and insisted, and the court submitted the question to the jury, that the defendant was negligent in backing this train on the passenger track, under the circumstances and in view of the surroundings and conditions, without having a light either on the side of the rear car nearest Hughes, or a man there with a light, and the jury found that it was negligence to move that train on the passenger track backward towards the switchman's shanty under the circumstances and surrounding conditions without such precaution, which was perfectly feasible. There was some evidence that this had been done on other occasions, one at least; but it is apparent to any intelligent man that a light could have been attached to one side of the rear end of this moving train—that is, the end nearest Hughes—or that a man taking hold of the grabiron and with his foot in the stirrup and holding a lantern could have seen the track for some little distance in front of the moving train as it proceeded towards the shanty. I think the case was properly submitted to the jury, and that the evidence presented a question of fact for the jury to determine, and that the verdict should not be disturbed.

"*Southern Railway Co.* v. *Smith*, (C. C. A. 6th Circuit) 205 Fed. 360, 123 C. C. A. 488, is a case closely in point. It is there held:

> 'While it is primarily the duty of a switchman in railroad yards to be on the lookout and keep out of the way of moving engines, there is a concurrent or secondary duty, independent

of statute or rule, on the part of those in charge of such moving engines, to keep such lookout as is reasonably necessary to avoid injury to an employee who may neglect to protect himself, and the extent of such duty is measured by the peculiar circumstances of the case.

'While plaintiff's intestate, who was a switchman in defendant's railroad yards, was walking along a track in the yards at night, he was overtaken and killed by an engine which was "drifting" or moving slowly behind him on the track, making very little noise. Its headlight was dim, and rendered more so by the electric yard lights, and there was a train passing on an adjoining track, which covered what noise the engine made. It could have been stopped within 10 feet, but the engineer did not see deceased. Held, that the facts tended to show that the engineer was negligent, and his negligence had a causal relation to the injury, and that a verdict for plaintiff was supported by the evidence.'

* * * * *

"The jury well may have found that to move these cars by backing down on the passenger track, under such conditions and surroundings, in the darkness, with no light at all at that end of the train, and only a man with a lantern on top of the car, was negligence. It was, of course, the duty of the defendant and of those moving these cars to keep such lookout as was reasonably necessary to avoid doing injury to an employee who under the circumstances might have neglected to fully protect and care for himself. The extent of the duty depended on the circumstances of the case, and the question was in my judgment one for the jury to determine."

If by any stretch of the imagination the petitioner could persuade this court that Rolla was a yard and

not a station, then it would still have to contend with the undisputed fact that Conductor Toops was an utter stranger both to the tracks at Rolla, Kansas, to the crew, and to their method of conducting switching operations. Mr. Toops had been in the employ of the Santa Fe for a good many years but had not been over this branch line for 13 years. He had been employed in the passenger service for the four or five years immediately preceding the accident. He had never seen either of the brakemen and was but slightly acquainted with the engineer and the fireman. There was some testimony of a custom of kicking cars without warning, but there was also the testimony of the engineer, Robinson (R. 82), that "it was not the custom to back cars where you could not see the end, without somebody to protect whoever might be on the track, whether there is a roadway or not"; and Engineer Hall testified (R. 42), "It is usual for the engineer to give a signal when he is starting up a train on a kick signal." So it would still be a question for the jury as to whether or not there was such a custom. In addition to that there is the silence of the entire record as to whether or not Toops knew of such a custom; and if he did not know of such a custom, then he could not be charged with negligence for not observing it. No one told him about such a custom; in fact, there was no such custom proven. Toops did not assume the risks of the defective track nor the negligent operation of the train.

36 C. J. 692, Paragraph 896, states the substantive law on the assumption of risk. It is as follows:

"Risks which arise from the negligence of the master or those representing him are not 'ordinary risks' incident to the employment, but are 'extraordinary risks.' Hence, under the general rule as to extraordinary risks, but subject to the limitations hereinafter considered, risks which result from the negligence of the master, that is to say, those risks which are avoidable by reasonable care on his part, are not assumed by the servant. The master, in the proper performance of his duties as such, is bound to exercise care and prudence to prevent his employees from being subjected to unreasonable risks or dangers, and to agree by implication of law not to subject a servant employed by him to extraordinary or unusual perils, and the servant has the right to assume that the master will perform his duty in this respect, except to the extent that the rule may be modified as to risks that are so open and obvious that a man of ordinary prudence would see and appreciate them; and it is very generally declared that the risk assumed commences only after the master has exercised due care in the performance of the duties which the law casts upon him."

18 R. C. L., Master and Servant, paragraphs 167 and 168, read as follows:

"Risks 'Assumed'; 'Ordinary' Perils of Employment—The dangers in respect of which there can be no recovery for injuries by virtue of the doctrine of assumption of risk include but according to the generally accepted statement do not extend beyond the 'ordinary' risks of the employment or such as are 'incident' thereto. And the 'ordinary' risks incident to the service are those perils of which employees have notice or which are patent and obvious to them. To risks which arise after the commencement of employment, as well as to those contemplated when the service began, the doctrine of assumption of risk applies, but a

change of appliances of which an employee has no knowledge or notice is not a risk which he assumed.

"Employer's Negligence as Included among Risks 'Assumed.'—A topic that has given rise to much comment and not a little confusion is whether the employee 'assumes the risk of the employer's negligence.' A note of indefiniteness is noticeable in many of the expressions, and some statements are quite unintelligible. It is generally asserted without qualification that the employee does not assume the risk of the employer's negligence, but just what conception is embodied by this expression is not directly explained. It is reasonably certain, however, that what is meant is that the employee is not barred of recovery for injuries due to perils of which he has no knowledge and appreciation. It must be constantly borne in mind that liability is to be determined with a view to the comparative knowledge of the parties. Primarily the employer is bound to provide for the safety of his employees, and the employees have a right to rely upon the performance of this duty. They are not barred of recovery for injuries—or in the terminology of the present topic they do not 'assume the risk'—occasioned by the failure of the employer to perform his primary duty, unless they have actual or constructive knowledge of the dereliction and of the perils arising therefrom, and continue in the employment without protest or complaint. The principle, it will be noted, is that of contributory negligence. So the employee does assume the risk of the employer's negligence when the fact of such negligence is known and the danger therefrom appreciated by him. Under the rule of the common law the employer virtually may conduct his business according to his own ideas, although another method would be less dangerous, and if his employee knows the hazards incident to the business in the manner in which it is carried on, and continues in the employment, he 'assumes the risks' of the more dangerous meth-

od. Accordingly, if the employer furnishes his employee with a tool, apparatus or machine that is not reasonably safe, and the employee proceeds with the work with the full knowledge of the defect and danger, there can be no recovery in case of a resulting injury; for, it is said, the employee 'assumed the risk.' Again, if the employee consents to occupy the place assigned him in which to work, and to incur all the dangers incident thereto, having sufficient intelligence and experience to enable him to comprehend such dangers, his assent dispenses with the performance of the employer's duty to furnish him with a safe place in which to work."

The petitioner says on page 36 of its petition that there was no cut. This is entirely contrary to the record. Practically every witness who testified on either side of the case, testified that there was a cut, and the two photographs (R. 85 and 86) show that there was a cut. The first photograph shows the high bank on the south side, and the second photograph shows distinctly the cut. The pictures are not very clear copies, but the court, by reference to them, can readily see that the cut obscures all but the top part of the elevators. It is higher than the eaves of the depot, and on the north side of the tracks the foundation of the agent's house and the fence around the house, are 6 or 8 feet above the track level. Certainly this is a cut.

The case of *C. R. I. & P. R. R. Co.* v. *Ward*, 252 U. S. 18, is a case very much in point here. In that case Ward, a switchman was thrown from the top of a box car upon which he was about to apply the brake. There was no question of the insufficiency of the equip-

ment. The only question was the contributory negligence of his fellow servants and assumption of risk. The court said on page 21:

"As to the nature of the risk assumed by an employee in actions brought under the Employers' Liability Act, we took occasion to say in *Chesapeake & O. R. Co.* v. *DeAtley*, 241 U. S. 310, 315, 60 L. ed 1016, 1020, 36 Sup. Ct. Rep. 564: 'According to our decisions, *the settled rule is not that it is the duty of an employee* to exercise care to discover extraordinary dangers that may arise from the negligence of the employer or of those for whose conduct the employer is responsible, *but that the employee may assume that the employer or his agents have exercised proper care* with respect to his safety until notified to the contrary, unless the want of care and the danger arising from it are so obvious that an ordinarily careful person, under the circumstances, would observe and appreciate them.' The Federal Employers' Liability Act places a co-employee's negligence, when it is the ground of the action, in the same relation as that of the employer upon the matter of assumption of risk. 241 U. S. 313. See also *Chesapeake & O. R. Co.* v. *Proffitt*, 241 U. S. 462, 468, 60 L. ed. 1102, 1106, 36 Sup. Ct. Rep. 620; *Erie R. Co.* v. *Purucker*, 244 U. S. 320, 61 L. ed. 1166, 37 Sup. Ct. Rep. 629.

"Applying the principles settled by these decisions to the facts in this case, the testimony shows that Ward had neither warning nor opportunity to judge of the danger to which he was exposed by the failure of the engine foreman to cut off the cars. In the absence of notice to the contrary, and the record shows none, Ward had the right to act upon the belief that the usual method would be followed and the cars cut off at the proper time by the engine foreman, so that he might safely proceed to perform his duty as a switchman by setting the brake to check the cars which

should have been detached. For the lack of proper care on the part of the representative of the railway company while Ward was in the performance of his duty, he was suddenly precipitated from the front end of the car by the abrupt checking resulting from the failure to make the disconnection. This situation did not make the doctrine of assumed risk a defense to an action for damages because of the negligent manner of operation which resulted in Ward's injury, and the part of the charge complained of, though inaccurate, could have worked no harm to the petitioners. It was a sudden emergency, brought about by the negligent operation of that particular cut of cars, and not a condition of danger, resulting from the master's or his representatives' negligence, so obvious that an ordinarily prudent person in the situation in which Ward was placed, had opportunity to know and appreciate it, and thereby assumed the risk" (our italics).

Another case in which both the question of assumption of risk and defective appliances, were at issue, is that of *Gila Valley, G. & N. R. Co.* v. *Hall*, 232 U. S. 94. In that case Hall recovered judgment for injuries sustained by him in the wreck of a three-wheeled gasoline velocipede which had a defective wheel. On page 100 of the decision the supreme court indulges in some presumptions and inferences which are infinitely more far-fetched than would be any presumption or inference in the instant case. On the question of the assumption of risk, the court said, page 101:

> "'The true test is not in the exercise of ordinary care to discover dangers, by the employee, but whether the defect is known or plainly observable by him. An employee is not charged by law with the assumption of a risk arising out of

defective appliances provided by his employer, unless his employment was of such a nature as to bring to his attention and cause him to realize and comprehend the dangers incident to the use of such appliances.' This, we think, was a correct instruction under the circumstances of the case. An employee assumes the risk of dangers normally incident to the occupation in which he voluntarily engages, so far as these are not attributable to the employer's negligence. But the employee has a right to assume that his employer has exercised proper care with respect to providing a safe place of work, and is not to be treated as assuming the risk arising from a defect that is attributable to the employer's negligence unless the employee becomes aware of such defect, or unless it is so plainly observable that he may be presumed to have known of it. Moreover, in order to charge an employee with the assumption of a risk attributable to a defect due to the employer's negligence it must appear not only that he knew (or is presumed to have known) of the defect, but that he knew it endangered his safety; or else such danger must have been so obvious that an ordinarily prudent person, under the circumstances, would have appreciated it. *Union P. R. Co.* v. *O'Brien*, 161 U. S. 451, 457, 40 L. ed. 766, 770, 16 Sup. Ct. Rep. 618; *Texas & P. R. Co.* v. *Archibald*, 170 U. S. 665, 671, 42 L. ed. 1188, 1191, 18 Sup. Ct. Rep. 777; *Choctaw, O. & G. R. Co.* v. *McDade*, 191 U. S. 64, 68, 48 L. ed. 96, 100, 24 Sup. Ct. Rep. 24; *Texas & P. R. Co.* v. *Swearinger*, 196 U. S. 51, 62, 49 L. ed. 382, 387, 25 Sup. Ct. Rep. 164, 17 Am. Neg. Rep. 422; *Burns* v. *Delaware & A. Teleg. & Teleph. Co.*, 70 N. J. L. 745, 752, 67 L. R. A. 956, 59 Atl. 220, 592, 17 Am. Neg. Rep. 673."

The case of *Illinois Cent. R. Co.* v. *Norris*, 245 Fed. Rep. 926, is a case which arose in the State of Illinois and was taken on error to the District Court of

the United States for the Eastern District of Illinois. Norris was killed while in the act of coupling up two cars. The engineer testified that he received the signal to back up; that shortly before he received the signal, he saw on the same side of the train, two lanterns, one of which he believed was carried by the brakeman, and one by the conductor. The conductor testified that he did not know where Norris was nor did he see him or his lantern shortly before he gave the signal to back up; that he did not know nor was it his duty to find out Norris' exact position before giving the signal to back up.

We quote now from the court's opinion on page 929:

> "Defendant further contends that the evidence, viewed most favorably to the plaintiff, fails to support a verdict against it, and that the motion to direct the verdict for the defendant should have been granted. The alleged negligence of the defendant was based upon the action of the conductor in directing the engineer to back up the train when Norris was between the cars and subject to be injured by any sudden and unexpected movement of the cars. It appears from the testimony of the engineer that, immediately before receiving this signal to back up, he looked out of the cab window and saw upon the same side of the train, lights from two different lanterns, and it is well nigh impossible to conclude that these two lanterns were held by any one other than the conductor and the brakeman, Norris. It is therefore contended by the plaintiff, that, the brakeman being between the conductor and the engineer shortly before the signal to back was given and he having disappeared at the time the signal was given, the conductor was negligent in direct-

ing a movement of the train which was necessarily fraught with such danger to the life of the brakeman.

"Defendant contends that, notwithstanding this evidence, it was free from neglect, because of the testimony of the conductor to the effect that he did not see the brakeman and that, it was not his duty to locate him before giving the signal. We cannot accept the defendant's contention, notwithstanding the conductor's statement that each employee looked out for himself, and that it was not customary for a conductor to ascertain where his men were before he gave a signal. We are convinced that the evidence warranted the jury in finding the conductor negligent upon the facts disclosed by the testimony in this case. The testimony justified the jury in finding that the conductor had good reason to believe the brakeman was between the cars. It was the brakeman's duty to go between the cars and release angle cocks and shut off the air in switching cars.

"Where the brakes are operated by air, it is necessary for the brakeman or conductor to 'cut the line' as well as to uncouple the cars. Norris had been constantly so engaged to the knowledge of the conductor. He was supplied with a lantern. Both men were busily engaged in a common task and were only a short distance apart. If Norris' lantern was not in sight, the conductor had good reasons to believe that he was between the cars. The conductor, on cross examination, admitted that it was the duty of each of them (the conductor and the brakeman) 'to look out for each other as much as possible.' We conclude that the jury was amply justified from all the evidence in finding the conductor guilty of negligence in the respect claimed by the plaintiff.

"Nor did the deceased assume the risk of such signal being carelessly given. We may well accept the statement that each employee in switching operations, was to look out for himself, and yet

a brakeman could not be said to have assumed the risk arising from the negligent conduct of the conductor. The brakeman was not chargeable with notice that his fellow employee would violate a rule or a custom. He had reason to believe the conductor would not move the train while he was between the cars. If, as the conductor said, it was his duty to look out for the brakeman as much as possible, the brakeman had a right to assume that such duty would not be violated. *We conclude no error was committed in submitting both the questions of the defendant's negligence and the deceased's assumption of risk to the jury*" (our italics).

You will note the circumstances in the above quotation in the third paragraph where the conductor on cross examination said it was the duty of trainmen "to look out for each other as much as possible." In this case we do not have the direct evidence that it was their duty to look out for each other as much as possible, but we do have the evidence of Mr. Nolan that he had been trying to locate Mr. Toops' lantern (R. 26), and also the evidence of Mr. Hemphill that when the engineer stopped he thought it was because they had gotten out of sight and the engineer had stopped for a signal, and he gave him a back up signal before he discovered that something had happened (R. 37). So we believe that we are safe in saying that it is the duty of members of a railroad crew to look out for each other as much as possible. That is common sense. Surely railroad men must work together. They are none of them a law unto themselves. The engineer must back on signal and the signal must come from the brakeman. Surely one brakeman doesn't just decide that they are

going to back up and give the signal. They must work together. In this case they didn't work with Mr. Toops. They forgot all about him. They knew what his duties were—that he should cross the track and assist in the switching. He had a bright lantern, easily visible. There was nothing on earth but the cars upon which they were working to obstruct the view of his lantern, and if they didn't see his lantern they should have known he was in a place of danger and should not have given the back up signal without knowing where he was or without giving some warning signal that they were about to back the cars without anyone on them and without a light being on them. Surely he was entitled to that whether the track was good or not and whether he was a stranger to this territory or not, and the fact that the track was defective and negligently constructed, and so found by the jury, and the fact that he had not been down there for thirteen years, that he didn't know the location of the tracks other than approximately, that he did not know the switch crew nor their method of switching and that there were no switch lights, was all the more reason why they should have fulfilled to the letter the rules and regulations prescribed by the company, or have given him some warning or have instructed him as to the custom of this crew.

The case of *Central R. Co. of New Jersey* v. *Colasurdo*, 192 Fed. Rep. 901, was another case in which the injury was occasioned by the kicking in without warning of unlighted cars. Two people were injured in this accident, one was killed and Colasurdo lost his

leg and filed this action. The plaintiff and two others were repairing a switch in the Jersey City yard. Shortly before the accident occurred a train of four cars arrived at the station and after discharging its passengers the four cars were kicked back to the station platform for reloading. They had no motive power and were controlled only by their own brakes. Quoting now from this case on page 902:

> "There was testimony from which the jury may have found that this train was not lighted and was running at the rate of ten miles an hour in charge of a single brakeman, that no signal or warning of its approach was given and that the brakes were not applied until the train was but six or eight feet distant. There can be no question that the three men, all of them experienced railroad men, were taken by surprise. Nighland was killed, the plaintiff lost his leg and Saldero escaped. If the testimony of the witness Gallagher be true, it seems incredible that some one of the three did not hear his shouts and whistles or see the lights on the platform of the advancing car. The fact that two of the men were run down is persuasive testimony that the car approached them silently and unseen.
>
> "We cannot believe that the risk of being injured in this manner while engaged in discharging his duty, was assumed by the plaintiff. He assumed the usual and ordinary risks of the calling, but when ordered to repair a track at night he had a right to assume that some precaution would be taken to guard him against extraordinary danger. If a watchman were not stationed to warn him of the approach of trains, he at least had a right to expect that a train would not back down upon him with no notice of its approach and no attempt to apply the brakes until only eight feet distant.
>
> "We have no doubt, if the federal liability act is applicable, that a cause of action was estab-

lished, for under it contributory negligence is no defense and the defendant is liable for the negligence of its employees Nighland and Gallagher."

The petitioner has sought by various means to becloud, both in the lower court and in this court, the meaning of its rules regarding the maintenance of a warning to switchmen while operating trains in stations. It has sought to nullify that rule by claiming that Rolla was not a station but a yard. This is not true. Rolla, Kansas, is a station. There are no yards and trains are not made up in Rolla, Kansas. There are some switching operations carried on there, of course, and they provide for those operations by appropriate rules and regulations. Rule 381 (R. 83) provides that conductors of freight trains are required to do their work thoroughly at stations. Rule 320 (R. 83) says that "trainmen and yardmen before switching or moving cars at stations, etc.," and No. 396 (R. 83) says that "local freight trains are generally to do necessary switching at stations, but any freight train may in case of necessity be called upon by station agents," and then in the same rule, that "conductors when at stations doing work will attend personally to the switching unless otherwise engaged." We do not see by any stretch of the imagination how Rolla, Kansas, could be called a yard. It is not a terminal; no trains are made up there; the only trains which go through are trains made up in the yard at Dodge City and dispatched on this line to Elkhart, and then trains are made up at Elkhart for Dodge City, and all intermediate points are stations; no branch line comes into Rolla; there are no yard limit

signs and not even switch lights at Rolla, Kansas. The rule book defines "station" as a place designated on the time table by name and at which a train may stop for traffic, or to enter or leave the main track or from which fixed signals are operated (R. 82); while "yard" is defined as a system of tracks within *defined limits* provided for the making up of trains, storing of cars and other purposes over which movements not authorized by time table or by train order may be made subject to prescribed signals and regulations (R. 83). If Rolla, Kansas, is not a station, then the Santa Fe Railway Company does not have a station anywhere, and the fact that they do have stations is testified to by the rule book and the many rules therein contained for the operation of trains *through stations.* The only question is: Does the place come within *the rule defining a station?* Rolla comes squarely under the station rule. All the evidence of the witnesses was that Rolla is a station. It follows that Rolla is a station and rules No. 24 and No. 102 providing for the placing of either a brakeman or a light on the rear end of the kicked car, are applicable. Failure to comply with these rules as well as the failure of the switchman to comply with the custom of giving a signal, was negligence and so found by the jury; and such negligence was the direct and proximate cause of Toops' death.

The petitioner has cited extensively from, and seems to rely greatly upon the recent case of *Toledo, St. L. & W. R. Co.* v. *Allen,* 276 U. S. 165. We have studied this case carefully and it is easily distinguished from the present case in many of its important phases.

First, in the Allen case the accident happened in a busy yard, while in the instant case the accident happened at a way station.

Second, Allen was a car checker and had been employed in the yards for about 18 months immediately previous to the accident, while here Toops had not been over these tracks for many years and had not worked on a freight crew for 4 or 5 years.

Third, the court said in the Allen case (p. 171):

> "And there is no support for the assumption that plaintiff was without knowledge of the switching practice followed in that yard or that the movement in question created an unusual hazard."

In our case there is a complete lack of evidence that Toops was acquainted with any custom of "kicking" cars. The evidence that there was any such custom, was disputed, and certainly it remained for the jury to weigh the evidence.

Fourth, the court said in the Allen case on page 171:

> "In any event plaintiff assumed the risk. He was familiar with the yard and the width of the space between the tracks and knew that cars were liable to be shunted without warning to him. The dangers were obvious and must have been fully known and appreciated by him."

While here, Toops was not familiar with the tracks at Rolla—he did not know where they were except in a general way—he can hardly be charged with the sharp curve or the high bank, and certainly he did not know of the "skeletonized" condition of the track. The night was dark and these conditions were not obvious and were not fully known and appreciated by him.

Fifth, in the Allen case, Allen was a car checker and not a member of the crew, and the court held that in the absence of actual knowledge on the part of the crew they were not required to vary their usual practice. In this case Toops was the conductor. They knew he was the conductor. They are charged with a knowledge of the provisions in the rules, that kicked-in cars at stations must be protected by a man or by a light. They knew they were strangers to Toops; they knew that he had to cross the elevator tracks and that it was a place of danger. No custom of kicking cars was proven and there is not a scintilla of evidence that Toops had ever heard of such a custom, much less that he knew any such custom existed among the members of this particular crew. So this crew knew that Toops was in a place of danger, or, in the exercise of any care at all, they should have known he was in peril.

In conclusion, we cannot refrain from mentioning the dissenting opinion. It will be noted that the dissenting opinion was written by one justice. Two others dissented to the opinion of affirmance but they did not concur in the dissenting opinion. Mr. Justice Burch seems to have gone off on a tangent and labored under the impression that because there were no eye witnesses the respondent could not recover because no on knew exactly how his death occurred. That is not the law, of course, and the reasoning applicable is admirably stated in the case of *Kelly* v. *Union Pac. Ry. Co.*, 141 N. Y. App. 490, 125 S. W. 818, wherein the court stated the proposition as follows (p. 820):

> "The evidence leaves a possibility of the deceased's death resulting from circumstances or

causes for which defendant would not be liable. But we think it showed sufficient facts and developed sufficient circumstances which united gave ample ground for the jury to say with reasonable certainty that the proximate cause of the death was defendant's negligence in leaving the wheelbarrow where it was. And reasonable certainty is all that is required. A possibility of a cause for which defendant would not be liable is not enough to outweigh a probability of such nature and carrying such strength as to produce reasonable certainty in the minds of a jury. A mere possibility will not justify a jury in finding a defendant innocent in a criminal prosecution. The fact that the catastrophe which happened to deceased was unseen will no more cut out a right to show by circumstances the cause of its occurring than would the unseen commission of a crime prevent conviction on circumstantial evidence. So after due consideration of the suggestions made by defendant as to the sufficiency of the evidence, we have concluded it was ample to sustain the verdict, and hence find there was no error in refusing the demurrer."

It is our contention that the case was properly submitted to the jury and that the evidence introduced is ample to sustain their findings, and that, therefore, the petition of the Atchison, Topeka & Santa Fe Railway Company for a writ of certiorari should be denied.

Respectfully submitted,

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